

FEDERAL CIRCUIT COURT OF AUSTRALIA

LIU v MINISTER FOR IMMIGRATION & ANOR

[2019] FCCA 1638

Catchwords:

MIGRATION – Application for judicial review of decision of Administrative Appeals Tribunal (**Tribunal**) affirming decision not to grant Partner (Residence) (Class BS) Subclass 801 visa (**801 visa**) on the ground the applicant and sponsor were never in a spousal relationship – whether in considering whether to grant an 801 visa the Tribunal was bound to proceed on the basis that at the time the applicant had previously been granted a Partner (Temporary) (Class UK) Subclass 820 visa the applicant was in a spousal relationship – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F, 109, 116, 501

Migration Regulations 1994 (Cth), reg.1.15A(3)

Migration Regulations 1994 (Cth), Schedule 2, cl.801.221, 820.221

Applicant:

YUJIA LIU

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

ADG 391 of 2016

Judgment of:

Judge Manousaridis

Hearing date:

21 June 2018

Date of Last Submission:

21 June 2018

Delivered at:

Sydney

Delivered on:

14 June 2019

REPRESENTATION

Counsel for the Applicant:	Mr L Karp & Mr G Schipp
Solicitors for the Applicant:	Australian United Lawyers
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

- (1) The application is dismissed.
- (2)
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

ADG 391 of 2016

YUJIA LIU

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This application for judicial review relates to the decision of the second respondent (**Tribunal**) to affirm the decision of a delegate of the first respondent (**Minister**) not to grant the applicant a Partner (Residence) (Class BS) Subclass 801 visa (**subclass 801 visa**).
2. At the time the Tribunal affirmed the delegate's decision the applicant held a Partner (Temporary) (Class UK) Subclass 820 visa (**subclass 820 visa**). One of the criteria the applicant had to satisfy to be granted a subclass 820 visa was that the applicant was the "*spouse*" of the "*sponsor*". (I will explain these words later in these reasons.) The applicant submits that, having been granted a subclass 820 visa, she

had satisfied the criterion of being the spouse of the sponsor; and that it was not, therefore, open to the Tribunal, when considering whether to grant a subclass 801 visa, to consider whether the applicant had *ever* been the spouse of the sponsor. The applicant further submits, however, that, contrary to what was open to it to do, the Tribunal determined the application by considering and answering adversely to the applicant the question whether the applicant was *ever* the spouse of the sponsor.

3. As I will discuss later, the resolution of this application for judicial review largely turns on the proper construction of 801.221(6) of Schedule 2 to the *Migration Regulations 1994* (Cth) (**Regulations**) as it applied when the applicant applied for the combined subclass 820 visa and subclass 801 visa.¹

4. Background

5. On 8 August 2013 the applicant, a national of China, applied for the combined grant of a subclass 820 visa and a subclass 801 visa. To have been entitled to the grant of a subclass 820 visa the applicant had to satisfy at the time of decision, among other things, cl.820.211(2)(a) of Schedule 2 to the Regulations, namely, that she was the “*spouse*” of a person who is an Australian citizen (**sponsor**).
6. Subsection 5F(1) of the *Migration Act 1958* (Cth) (**Act**) provides that a person is a “*spouse*” of another person if, under s.5F(2) of the Act, the person and sponsor are in a “*married relationship*”. Subsection 5F(2) of the Act provides that persons are in a “*married relationship*” if:
 - a) (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - b) (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - c) (c) *the relationship between them is genuine and continuing; and*
 - d) (d) *they:*

¹ The relevant provisions of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) are those that were in force at the time the applicant applied for the subclass 820 visa and the Partner visa. For ease of expression, however, I will refer to the relevant provisions in the present tense.

- e) (i) *live together; or*
- f) (ii) *do not live separately and apart on a permanent basis.*

7. Subsection 5F(3) of the Act provides that the Regulations “*may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist*”. Under reg.1.15A(2) of the Regulations the Minister, when considering an application for a Partner visa, must “*consider all of the circumstances of the relationship, including the matters set out in subregulation (3)*”. The matters set out in reg.1.15A(3) of the Regulations are the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the persons’ commitment to each other. The social aspects of the relationship include “*the opinion of the persons’ friends and acquaintances about the nature of the relationship*”.²

8. To have been entitled to a subclass 801 visa, the applicant had to meet the requirements of, among other things, either cl.801.221(2) or cl.801.221(6) of Schedule 2 to the Regulations. Subclause 801.221(2) relevantly provides:

9. *An applicant meets the requirements of this subclause if:*

10. (a) *the applicant is the holder of a Subclass 820 visa; and*

11. (b) *the applicant continues to be sponsored for the grant of the Subclass 820 (Partner) visa by:*

12. (i) *the sponsoring partner;*

13. . . . ; *and*

14. (c) *the applicant is the spouse . . . of the sponsoring partner; and*

15. (d) *at least 2 years have passed since the application was made.*

²*Migration Regulations 1994* (Cth) reg.1.15A(3)(c)(ii)

16. Subclause 801.221(6) of Schedule 2 to the Regulations relevantly provides:

17. An applicant meets the requirements of this subclause if:

(a) the applicant is the holder of a Subclass 820 visa; and

(b) the applicant would meet the requirements of subclause (2) , , except that the relationship between the applicant and the sponsoring partner has ceased; and

18. (i) either or both of the following circumstances applies:

19. (A) the applicant;

20.

21. has suffered family violence committed by the sponsoring partner;

22. On 8 February 2014 the applicant was granted a subclass 820 visa on the basis that she was married to the sponsor. On 12 April 2015, however, the sponsor sent an email to what is now known as the Department of Home Affairs (**Department**) stating that his marriage with the applicant had broken down, and that he wanted to withdraw his sponsorship.³ The sponsor stated he and the applicant had not seen each other for twelve months.

23. That prompted the Department to send to the applicant a letter dated 5 May 2015 informing her that the Department had received information that indicated the spousal relation on which her application for the subclass 820 and Partner visa was based had ended, and that it was likely that this would result in the refusal of her application.⁴ The Department invited the applicant to provide a response explaining the applicant's current circumstances, and the reason for the breakdown of the relationship.

³ CB5

⁴ CB9

24. The applicant responded by submitting a statutory declaration claiming she was the victim of family violence perpetrated by the sponsor.⁵ The applicant claimed the domestic violence occurred in November 2013, which resulted in her escaping from Adelaide and hiding in Sydney and Canberra to avoid further harm.
25. On 8 August 2013 the delegate refused to grant the applicant a subclass 801 visa. The delegate refused to do so because the delegate found the applicant did not comply with public interest criterion (PIC) 4020(1). That required that there be no evidence before the Minister and other bodies of a bogus document or of information that is false or misleading in a material particular in relation to, among other things, the application for the visa.

26. Before the Tribunal

27. On 11 October 2015 the applicant applied to the Tribunal for review of the delegate's decision. In a submission the applicant's representative provided to the Tribunal on 25 April 2016,⁶ it was claimed that the applicant's relationship with the sponsor continued until November 2013, and submitted that PIC4020 did not apply to the applicant's case.
28. The applicant appeared before the Tribunal on 27 September 2016 to give evidence and present arguments. On 4 October 2016, after the hearing, the applicant's representative provided documents in support of the existence of a spousal relationship between the applicant and sponsor.

29. Tribunal's reasons

30. The principal question the Tribunal considered is whether the applicant and sponsor were in a spousal relationship. The Tribunal accepted the applicant and sponsor married; and that the applicant and sponsor lived together for a time, shared some social interaction, and communicated with each other. The Tribunal, however, was not satisfied the applicant and sponsor "*shared a spousal relationship*".⁷ It concluded:⁸

⁵ CB18-23

⁶CB121-128

⁷CB268, [53]

⁸CB269, [56]

31. *On the information before the Tribunal, the parties separated in November 2013, three months after they married. On the information before the Tribunal, it is not satisfied that the sponsor and the applicant were ever in a spousal relationship. It is not satisfied that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others; that their relationship was genuine and continuing and that they did not live separately and apart on a permanent basis. The applicant therefore does not meet the requirements of s.5F of the Act.*

32. The Tribunal then referred to the applicant having claimed she has suffered domestic violence committed by the sponsor, and said:⁹

33. *As the Tribunal is not satisfied that a spousal relationship ever existed between the applicant and the sponsor, it has not gone on to consider whether the applicant has suffered family violence committed by the sponsor. As a result the applicant does not meet cl.801.221(6).*

34. **Ground of application**

35. The application contains the following ground:

36. *The Second Respondent (the Tribunal) exceeded its jurisdiction by deciding the applicant's visa application on the basis that the applicant and her estranged husband were never in a spousal relationship as defined in s.5F of the **Migration Act**.*

37. Particulars

38. (a) *The Tribunal when considering a visa application relying on the criteria in subclass 801 of Schedule 2 of the **Migration Regulations** is not lawfully able to revisit the question of whether the couple were in a genuine and continuing relationship at the time of the grant of the applicant's visa which had been previously found to satisfy subclass 820.*

39. *Parties' submissions*

⁹CB269, [57]

40. In his written submissions counsel for the applicant submitted that the Tribunal directed its attention to the question whether the applicant and sponsor had ever been in a spousal relationship as defined in s.5F of the Act, but the Tribunal did not have any power to consider that question. That is so, counsel submitted, because the applicant had already been granted a subclass 820 visa which necessarily implied that she had satisfied cl.820.211(2)(a) of Schedule 2 to the Regulations which, as I have already noted, required that the applicant is the “*spouse*” of a person who is an Australian citizen; and the only means by which that criterion could have been reconsidered is under provisions of the Act permitting the cancellation of a visa, such as s.109, s.116, and s.501 of the Act.
41. Counsel for the applicant repeated the substance of these submissions in his oral address. He also submitted that, on the proper construction of its reasons, the Tribunal considered the question of whether to affirm the delegate’s decision solely through the prism of whether the applicant and sponsor were ever in a spousal relationship within the meaning of s.5F of the Act. Counsel further submitted that the fact the Tribunal concluded it was not necessary to consider the applicant’s claim that she was the victim of family violence supports the contention that it asked itself the wrong question.
42. In his written submissions counsel for the Minister submitted the applicant has not explained the source of the Tribunal’s limitation to consider whether the applicant had satisfied the criterion contained in cl.820.211(2) of Schedule 2 to the Regulations. Counsel further submitted the Tribunal was not bound by any finding the delegate may have made when granting the subclass 820 visa. Counsel submitted that on a fair reading of its reasons, the Tribunal addressed the question whether the applicant satisfied cl.801.221(2) and cl.801.221(6) of Schedule 2 to the Regulations; it did not purport to revisit whether the applicant had satisfied the criteria provided for by cl.820.211(2) of Schedule 2 to the Regulations.
43. *Question arising*
44. The question that arises on the parties’ competing submissions is not whether the Tribunal had power to revisit whether the applicant had satisfied a criterion for the grant of the subclass 820 visa. It is almost

self-evident that, when reviewing a decision of a delegate not to grant a particular class of visa, it is not open to the Tribunal to consider whether the applicant had satisfied the criteria of some other class of visa he or she had been granted unless there is an identifiable source of power for it to do so. The question that arises is whether the Tribunal failed to address the question or questions it was required to address, or whether it considered a question it ought not to have considered, when considering whether it should affirm the delegate's decision not to grant the applicant a subclass 801 visa.

45. *Did the Tribunal address the wrong question?*
46. Whether the Tribunal addressed the wrong question turns on the proper construction of cl.801.221(6) of Schedule 2 to the Regulations; and that is so because the applicant claimed that she and the sponsor had separated, and that she was the victim of family violence committed by the sponsor. To satisfy cl.801.221(6), therefore, the applicant had to show:
- a) she was the holder of a subclass 820 visa;
 - b) the applicant “*would meet the requirements of subclause (2)*” (subclause 2A is not relevant), namely (among other things), that “*the applicant is the spouse . . . of the sponsoring partner*”, “*except for*” two particular matters; and
 - c) the particular matters (relevantly) are:
 - i) the relationship between the applicant and the sponsoring partner has ceased; and
 - ii) the applicant “*has suffered family violence committed by the sponsoring partner*”.
47. On its proper construction cl.801.221(6) requires the decision-maker to posit a hypothetical state of affairs, namely, that which would exist “*except for*” the relationship between the applicant and sponsoring partner having ceased, and the applicant's having suffered the family violence he or she claims to have suffered; and to ask whether that state of affairs would meet the requirements of cl.801.221(2), namely, the applicant is the spouse of the sponsoring partner. Subclause 801.221(6)

of Schedule 2 can only be engaged if the decision-maker is satisfied that, “*except for*” the cessation of the relationship between the applicant and the sponsor, and the applicant’s having suffered the family violence, as claimed by the applicant, the applicant and sponsoring partner would be in a spousal relationship. If the decision-maker is not so satisfied, the question of whether the applicant suffered the claimed family violence does not arise.

48. The applicant in the case before me claimed she suffered family violence committed by the sponsoring partner; that occurred in November 2013; and it was the family violence that led her to escape from the sponsor. In these circumstances a question the Tribunal was required to consider was whether, “*except for*” the applicant’s relationship with the spouse having ceased, and the applicant’s having suffered the family violence she claims to have suffered, the applicant and sponsor would be in a spousal relationship. To answer that question the Tribunal was required to consider whether the relationship between the applicant and the sponsor as it existed in November 2013 (being the month in which the applicant claimed she was the victim of family violence committed by the sponsor, and which led her to escape from the sponsor) met the requirements of cl.801.221(2), namely, the applicant was the spouse of the sponsor. That rendered relevant all evidence that related to the nature and extent of the applicant’s relationship with the sponsor, including whether the applicant and sponsor were ever in a spousal relationship. There is nothing in any provision of subclass 801 of Schedule 2 to the Regulation that could be taken to have required the Tribunal to be bound by any fact the delegate who had granted the subclass 820 visa may have been satisfied existed. The Tribunal was entitled, and, in my opinion, it was required, to consider for itself evidence of the relationship between the sponsor and the applicant spanning the entire period of their claimed relationship to determine whether, except for the applicant’s relationship with the sponsor having ceased, and the applicant’s having claimed to have suffered family violence, the applicant would be the spouse of the sponsor.
49. By considering whether the applicant and sponsor were ever in a spousal relationship the Tribunal did what it was permitted to do when considering whether cl.801.221(6) of Schedule 2 to the Regulations

was satisfied. The Tribunal did not purport to determine for itself whether the applicant did not satisfy any of the criteria of which the delegate who granted to the applicant the subclass 820 visa was satisfied, and the Tribunal, therefore, did not, for this or any other reason, make any jurisdictional error by considering whether the applicant and sponsor were ever in a spousal relationship.

50. Conclusion and disposition

51. The applicant has not succeeded on the ground on which she relies. I propose to order that the application be dismissed. I will consider the question of costs when I pronounce my order.

I certify that the preceding twenty six (26) paragraphs are a true copy of the reasons for judgment of Judge Manousaridis

Date: 14 June 2019